JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

For The

WESTERN DISTRICT OF WASHINGTON AT TACOMA

LABORERS INTERNATIONAL UNION LOCAL 252,	)	C80-209T
Plaintiff,	)	
v.	)	JUDGMENT
TOWN CONCRETE PIPE OF WASHINGTON, INC.,	)	
Defendant.	)	

This action came on for trial/ consideration before the Court, Honorable Jack E. Tanner, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is ordered and Adjudged Plaintiff's motion for Summary Judgment is denied, and the Defendant's Countermotion for Summary Judgment is granted.

Dated at Tacoma, Washington this 9th day of February, 1981.

Bruce Rifkin, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LABORERS INTERNATIONAL UNION LOCAL 252,	)	C80-209T
Plaintiff,	)	
v.	)	ORDER
TOWN CONCRETE PIPE OF WASHINGTON, INC.,	)	
Defendant.	)	

THIS MATTER comes on for consideration before the undersigned judge of the above-entitled court upon Cross Motions For Summary Judgment, pursuant to rule 56 FRCP. Having considered the aforesaid motions, and the entirety of the records and files herein, the court hereby finds and rules as follows:

1. This court has jurisdiction in this case pursuant to Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. §185.

2. Laborers International Union Local 252 (hereinafter referred to as the "Union") is a labor organization

representing the employees of Town Concrete Pipe of Washington, Inc., (hereinafter referred to as the "Employer").

3. The Union and Employer were parties to a collective bargaining agreement provides for binding arbitration. "Only disputes involving interpretation or application of this agreement may be submitted to arbitration."

4. The collective bargaining agreement also contained a cost of living clause. The formula used to determine the yearly wage increase relied on the "COL Index (1967-Seattle Area Base)".

5. In 1978, the Bureau of Labor Statistics, of the U.S. Department of Labor announced to users of the consumer price index that with the release of the January index, the bureau would publish three consumer price indexes: (1) a

revised consumer price index for urban wage earners and clerical workers; (2) a new consumer price index for all urban consumers; and (3) the present unrevised consumer price index for urban wage earners and clerical workers. Users of the consumer price index were advised that "the unrevised index will not be available after the publication of the June, 1978 index." The Bureau of Labor Statistics also advised users of the consumer price index that "all existing contracts will have to be adjusted or rewritten because of the revision."

6. The collective bargaining agreement between the Union and the Employer contains a "Savings Clause", Article 16, that provides:

> "Should any part of or any provision herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation, or by any decree of a court of competent jurisdiction, such invalidation of such part or portion of this agreement shall not

> invalidate the remaining portions thereof; provided, upon such invalidation the parties signatory hereto agree to immediately meet to negotiate such parts or provisions affected. The remaining parts or provisions shall remain in full force and effect."

7. Although the Supreme Court has established a strong presumption in favor of arbitration of labor disputes, United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), the Supreme Court has also repeatedly held that it is for the courts to decide whether the parties have agreed to submit specific issues to arbitration, John Wiley & Sons v. Livingston, 376 U.S. 543, 546-47 (1964). The Supreme Court has also held that the law compels a party to submit his grievance to arbitration ly if he has contracted to do so. Gateway Coal Co. v. United Mineworkers of America, 414 U.S. 368, 374 (1974). These rules derive from the fact that "arbitration is a matter of contract and a party cannot be required to

submit to arbitration any dispute which he has not agreed so to submit." Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962).

8. Arbitration is a distinct procedure from collective bargaining and where the parties have agreed to resolve issues through negotiation they may not substitute the arbitration process to resolve matters they were not successful in resolving through bargaining. The Ninth Circuit has recognized that arbitration of grievances is a distinct procedure from collective bargaining, and where the parties have agreed to leave resolution of certain issues to negotiation, arbitration is not available because the issue is not arbitrable. Aluminum Co. of America, supra. Further, where government regulations or court action either make performance impossible or would require the arbitrator to amend

the collective bargaining agreement, the disputes are not arbitrable. Savannah Printing Union, 350 F. Supp 632, 82 LRRM 2721 (D.C., Southern District of Georgia, 1972); Burns Detective Agency v. Navarro, 274 NYS 2d 314, 63 LRRM 2327 (N.Y. Sup. Ct. App. Div., 1966).

That in view of the foregoing, it appears to the court that there is no genuine issues of any material fact herein, and it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment be and the same is in all respects DENIED, and it is further

ORDERED, that Defendant's Counter-motion for Summary Judgment be and the same is hereby GRANTED.

DATED this 5 day of February, 1981.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LABORERS INTERNATIONAL UNION LOCAL 252,	)	No. 81-3169
Plaintiff-Appellant,	)	D.C.No.C80-209T
v.	)	OPINION
TOWN CONCRETE PIPE OF WASHINGTON, INC.,	)	
Defendant-Appellee.	)	

Appeal from the District Court
For the Western District of Washington
Jack E. Tanner, District Judge, Presiding

BEFORE: HUG, SKOPIL and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

Laborers International Union Local 252 (Local 252) appeals from the district court's grant of summary judgment to Town Concrete Pipe of Washington, Inc. (Town Concrete), in the Local's section 301 suit to compel arbitration. 29 U.S.C §185.

FACTS

Local 252 and Town Concrete are parties to a collective bargaining agreement containing a mandatory

grievance-and-arbitration procedure covering questions of contract interpretation. The contract contains a provision for an automatic cost-of-living increase, the size of which was to be based on the Bureau of Labor Statistics' (BLS) Cost of Living (COL) Index. In 1978, the BLS discontinued the COL, and began issuing revised versions of the Consumer Price Index (CPI). Town Concrete took the position that the change from the COL Index to the CPI eliminated the cost-of-living clause from the contract, and that a new clause had to be negotiated. The parties negotiated, discussed arbitration, and the union filed a charge with the NLRB. Finally, the union filed the present suit to compel arbitration of the cost-of-living clause. We note jurisdiction under 28 U.S.C. §1291 and reverse.

ANALYSIS

The only issue in this case is whether the meaning of the cost-of-living clause is a question of contract interpretation subject to arbitration. The district court held that it was not and accordingly refused to compel arbitration. The district court's decision apparently was based on: (1) the savings clause in the contract; and (2) the fact that the parties had bargained over the the cost-of-living clause.

Federal labor policy favors arbitration, and doubts as to whether a particular dispute is arbitrable should be resolved in favor of arbitration. See United Steelworkers v.f American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (Steelworkers trilogy); Haig Berberian, Inc. v. Cannery Warehousemen, 535 F.2d 496, 499 (9th Cir. 1976).

Although it is true that the question of what issues are arbitrable is for the court, not the arbitrator, Leyva v. Certified Grocers of California, 593 F.2d 857, 861 (9th Cir. 1979), a court's determination of arbitrability must be based on the arbitration clause, not on the substantive contract clauses, Haig Berberian, 535 F.2d at 499. Interpretation of substantive provisions must be left to the arbitrator in the first instance. In order to determine that the savings clause covered the instant dispute, the district court had to read and interpret not only the savings clause but the cost-of-living clause as well. Both of these are substantive provisions of the contract and thus present questions for the arbitrator, not the court. Id.

Furthermore, even if the court were entitled to interpret the savings clause, the clause cannot be read properly to

cover the instant dispute. The savings clause applies to "invalidation" of any part of the contract by "legislation, or by any decree of a court of competent jurisdiction." Because arbitrators cannot ordinarily determine questions of "external law", see, e.g., Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 737-38 (1981), questions involving contract clauses rendered invalid by subsequent changes in law cannot ordinarily re resolved through arbitration. But the disputed clause here is not invalid, in the sense of being contrary to law or legally unenforceable, due to legislation or court decree. The action by the BLS is not legislation. The clause is, at worst, difficult to interpret because of change in underlying facts. Interpretation of the clause in light of these new fact is properly done by the arbitrator. The district court

therefore erred in granting summary judgment to Town Concrete on the basis of the savings clause.

The second basis for the court's decision is also erroneous. The fact that the parties have attempted to renegotiate the cost-of-living clause does not mean it is not subject to arbitration. Any clause in the contract could be renegotiated if the parties chose to do so; while contract clauses are still in effect, however, they continue to be subject to the arbitration clause unless specifically excluded. Aluminum Co. of America v. United Auto Workers, 630 F.2d 1340 (9th Cir. 1980), is not to the contrary. That case involved the arbitrability of any employer policy which had not basis in the contract and conflicted with no specific clause of the contract. The court there held the policy was not an arbitrable issue, and that the union had to resort to negotiation. By

contrast, the cost-of-living dispute concerns the language of the contract and its interpretation. Pacific Northwest Bell v. CWA, 310 F.2d 244 (9th Cir. 1962), similarly fails to justify the district court's action. That case involved the use of bargaining history of the arbitration clause itself to determine its scope, not use of the bargaining history of substantive contract clauses.

CONCLUSION

The judgment of the district court is reversed. The case is remanded with instructions to the district court to grant summary judgment to Local 252 compelling arbitration of the dispute.

REVERSED AND REMANDED.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

TOWN CONCRETE PIPE OF WASHINGTON, INC.,	)
Petitioner,	)
v.	)
LABORERS INTERNATIONAL UNION LOCAL 252,	)
Respondent.	)

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 1982, three copies the Petition for Writ of Certiorari were mailed, postage prepaid, to Lawrence Schwerin, Esq., 2701 First Avenue, Suite 400, Seattle, Washington 98121, counsel for Respondent. I further certify that all parties required to be served have been served.

/s/ Ronald J. Williams
Ronald J. Williams
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Salem, Oregon 97304
Of Counsel for Petitioner